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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.....

FIREMAN'S FUND INDEMNITY COMPANY,
Petitioner — Appellant Below,

Versus

UNITED STATES OF AMERICA,
Respondent — Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully shows:

I

OPINIONS IN THE COURTS BELOW

Opinion in the District Court of the United States for the Northern District of Florida is reported in 110 F. Supp. 937.[1]

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1. R. 51-61.

Opinion in the United States Court of Appeals for the Fifth Circuit is reported in 211 F.2d 773.[2]

II

BASES OF JURISDICTION

The jurisdiction of this Court is invoked on the following grounds:

A.

The Judgment of the Court of Appeals of the Fifth Circuit is dated March 31, 1954, and was entered on the same date;[3]

B.

An Order was entered by the court of appeals on May 5, 1954, extending the time for filing Petition for Rehearing to May 6, 1954.[4] Petition for Rehearing was filed in the court of appeals on May 6, 1954, pursuant to Order extending time.[5]

Order denying Petition for Rehearing was entered in the court of appeals on May 14, 1954.[6]

C.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

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2. R. 279-287.
3. R. 288.
4. R. 291.
5. R. 292-294.
6. R. 295.

III

QUESTIONS PRESENTED

The questions presented for review are:

A.

Whether the public vessel of the United States on which two longshoremen were injured and one killed by a falling hatch cover was seaworthy, as held by both lower courts, despite the undisputed fact that the designed type safety toggle pins were missing, because adequate substitutes for the missing pins were aboard the vessel?

B.

Should the court of appeals have upset the finding of the District Judge, based on conflicting testimony of witnesses who appeared before him, that the vessel in question was guilty of negligence, when no question as to the correctness of such finding had been raised by appellee by cross appeal or cross assignment of error?

C.

When the vessel in question is found to be guilty of negligence which proximately contributed to the injuries and death of longshoremen, does the concurring negligence of the employing stevedore contractor bar recovery by petitioner as subrogee under the Longshoremen's and Harbor Workers' Compensation Act for the benefit of the injured men and dependents of decedent?

D.

If the negligence of the vessel in question and the concurring negligence of the stevedore employer combined to cause the casualty, does the stevedoring contract between the United States and the stevedore employer bar recovery from the United States for the benefit of the injured men and dependents of decedent because the stevedore employer agreed in such contract to be responsible for damage caused by its own negligence?

IV

STATUTES APPLICABLE

The case involves the following statutes:

A.

The following portion of the Public Vessels Act, 43 Stat. 112, 46 USC 781:

> "A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920."

B.

The following portion of the Longshoremen's and Harbor Workers' Compensation Act, 60 Stat. 1095, 33 USC 933:

"COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 944 of this chapter shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'representative') to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to —

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907;

(C) all amounts paid as compensation:

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the

amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e)[1] of this section only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this chapter is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

V

STATEMENT OF THE CASE

Petitioner was Longshoremen's and Harbor Workers' Compensation Act insurance carrier of contract stevedores engaged in unloading the U. S. S. OKALOOSA, a public vessel of the United States, on September 1, 1948, at the Naval Air Station dock at Pensacola, Florida.

About an hour after employees of the stevedoring contractor took over unloading operations from ship's personnel, who had been engaged in discharging cargo, remaining cargo was cleared from the upper level of hold number 4 and the heavy steel hatch covers to lower hold number 4 were exposed and had to be raised to discharge cargo from beneath.

The hatch covers to lower hold number 4 were in two sections, each a heavy steel plate that opened inboard to an upright position. When opened in an upright position the designed method of securing them open was by means of "L" shaped latches attached to the forward and aft bulkheads of the hatch well, pivoted at their inboard ends on brackets, which fitted over the upper edge of the covers at each end thereof. There were matching holes in each movable latch and immobile bracket to which it was attached to permit the insertion through such holes of a safety toggle pin and thereby secure the latch against accidental opening. The design required a short length of chain at each of the four brackets, two each for the port and starboard covers, with a toggle pin secured to the free end of each chain so as to permit the insertion of the pin without removal from the chain.[7]

None of the four toggle pins was present at its designed location. The ship's people admittedly knew that all of the pins were missing and that within a short time after civilian stevedores took over the discharge of cargo, the upper level of hold number 4 would be cleared of cargo and the hatch covers to the lower level would have to be raised to discharge cargo from below. No substitutes for the missing pins were provided by the ship although there were bolts, not of

7. R. 39 (Diagram of hatch cover).

the designed type, aboard which could have been used, and after the accident were actually installed by ship's people as substitutes.

Shortly after the two hatch covers were raised and latched in an upright position by civilian stevedores, without the safety toggle pins to secure the latches against accidental opening, an empty pallet coming back aboard struck the starboard hatch cover and the jar caused the latches to open and the starboard cover to fall on the three men who were working on top of the full hold of cargo just beneath the starboard cover.

Petitioner, libelant in the district court and appellant in the court of appeals, was subrogated to the rights of the injured men and the one killed when, as Longshoremen's and Harbor Workers' Compensation Act insurer of their employer, it paid all expenses and compensation under awards duly made and filed, the benefits of which the injured men and dependents of decedent accepted. These three suits were later brought by petitioner as subrogee, under the Public Vessels Act, against the United States as owner of the vessel to recover all of the damages recoverable, respectively, by dependents of decedent and by the injured men on the several theories:

(1) The ship was unseaworthy on account of the missing safety toggle pins; and

(2) The ship was negligent in not providing a safe place to work, ship's personnel knowing that the pins were missing and that the hatch cover would shortly have to be raised.

The facts in each case, except the extent of injury and amount of loss, were identical and the cases were consolidated for trial and later for appeal to the court of appeals on one record.

The district court found:

(1) The ship was seaworthy, despite the undisputed fact that the designed type safety toggle pins were missing, because adequate substitutes for the missing pins were aboard the vessel.[8]

(2) The ship was negligent in not furnishing substitutes for the missing pins when it knew that the defective hatch must shortly be opened and used by the stevedores; but that despite such negligence petitioner, as subrogee seeking to recover all damages recoverable by the injured longshoremen, could not recover from the owner of the vessel because the employing stevedore contractor was also negligent in permitting men to work beneath an obviously defective hatch.[9]

(3) Although the ship's negligence and the negligence of the stevedore employer combined to cause the casualty, the stevedoring contract between the United States and the employer, as construed by the district court, barred recovery from the United States by petitioner on behalf of the injured men because the employer therein agreed to be responsible for damage caused by his own negligence.[10]

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8. R. 56.
9. R. 57-58.
10. R. 59-60.

The court of appeals sustained the district court's finding of seaworthiness,[11] ignored the questions before it as to the effect of the stevedoring contract and as to the effect of the concurring negligence of the stevedore employer; and although no cross appeal or assignments of error were filed in the court of appeals by appellee, respondent here, attacking the trial court's specific finding, on conflicting evidence, that the vessel was negligent, affirmed the case on the theory that the ship was not negligent and that the sole proximate cause of the injuries was the negligence of the contracting stevedore.[12]

VI

ARGUMENT

A.

As to Question A.:

The vessel had an ironclad, non-delegable duty to be and remain seaworthy, was absolutely liable for injury resulting from its failure so to be, and was unseaworthy because the safety toggle pins were missing from their designed location, despite the presence somewhere aboard the vessel of bolts which could have been used as substitutes.[13]

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11. R. 284.
12. R. 287.
13. United States vs. Arrow Stevedoring Company, 175 F.2d 329, 333, (Cert. den.) 338 US 904, 94 L.Ed. 557; Mahnich vs. Southern Steamship Company, 321 US 96, 88 L. Ed. 561 (Text 566-567); The Osceola, 189 US 159, 47 L.Ed. 760 (Text 764); Seas Shipping Company vs. Sieracki, 328 US 85, 90 L.Ed. 1099; Hawn vs. Pope and Talbot, Inc., et al, US, 98 L.Ed. (Advance p 101); Alaska Steamship Company vs. Petterson, 98 L.Ed. (Advance p 499).

In particular, the decision of both lower courts in this case is diametrically contrary to the decision of the Court of Appeals of the Ninth Circuit in United States vs. Arrow Stevedoring Company, supra, insofar as their finding that the vessel was seaworthy is concerned. That case is particularly appropriate here because it is obvious that the vessels were of the identical type and that the injuries in both cases occurred in hold number 4 because safety toggle pins were missing from the hatch cover latches. In the Arrow case the United States admitted, and the court found, that the ship was unseaworthy because the toggle pins were missing, and the United States paid damages to the injured man. Recovery was there permitted over against the stevedore employer, the only matter in controversy, because of the particular facts and the terms of the stevedoring contract in that case, both clearly distinguishable from the facts and the terms of the contract here involved.

B.

As to Question B.:

The district court found that the vessel was negligent.[14]

The record is devoid of any attack by the United States, appellee in the court of appeals and respondent here, on any of the findings of the trial court. Despite that fact, the court of appeals specifically exonerated the ship from negligence.[15] In this it went

14. R. 57.
15. R. 287.

further than its judicial discretion should reasonably permit.[16]

C.

As to Question C.:

The district court held specifically, and the court of appeals ignored this question which was properly before it, that the concurring negligence of the stevedore employer barred recovery by petitioner, libelant in the trial court, from the concurrently negligent vessel, on behalf of the injured men and dependents of decedent.[17]

There is no question but that an injured longshoreman can recover his damages from a negligent vessel despite the existence of contributory negligence on the part of his employer.[18] The trial court fell into error by infecting this right of the injured man, as sought to be enforced here by petitioneer as libelant

16. Morley Construction Company, et al, vs. Maryland Casualty Company, 300 US 185, 81 L.Ed. 593; Peoria and Pekin Union Railway Company vs. United States, 263 US 528, 68 L.Ed. 427; The Maria Martin vs. Northern Transportation Company 79 US 31, 20 L.Ed. 251 (Text 253, 257); Alexander vs. Cosden Pipe Line Company, 290 US 484, 78 L.Ed. 452 (Text 455-456); Union Tool Company vs. Elihu C. Wilson, 259 US 107, 66 L.Ed. 848 (Text 851); Charles S. Landram vs. Gabriella K. Jordon, 203 US 56, 51 L.Ed. 88 (Text 90); Arkansas Fuel and Oil Company vs. Leisk, 133 F.2d 79; Calhoun County, Florida vs. Roberts, 137 F.2d 130; Newport Industries, Inc. vs. Crosby Naval Stores, Inc., 139 F.2d 611; Commercial National Bank in Shreveport vs. Parsons, 144 F.2d 231, 145 F.2d 191; Hall vs. Keller, 180 F.2d 753 (Text 755 and 756).

17. R. 58.

18. Baccile vs. Halcyon Lines and Haenn Ship Ceiling and Refitting Corporation, 342 US 282, 72 S.Ct. 277, 96 L.Ed. 318; Hawn vs. Pope and Talbot, et al, supra.

below, with some fatal legal disease as it flowed from the injured longshoreman to petitioner through his concurrently negligent employer, by putting petitioner not in the shoes of the injured man but in those of the negligent employer; despite the fact that under the Longshoremen's and Harbor Workers' Compensation Act petitioner is entitled not only to recoup its own losses but has a moral and legal responsibility to recover all of the loss sustained by the injured man and account to him for it.[19] It requires a novel application of clear legal principles to arrive at the conclusion reached by the trial court: That although the injured man could recover from a negligent ship all of his damages, including pain and suffering and full loss of wages had he sued the ship, because his economic situation required that he accept compensation under the Act to maintain himself and family pending recovery of what he would otherwise be entitled to receive from the negligent vessel, he is in effect deprived of his right against the ship because his employer was also negligent and contributed in some degree to his injuries. Yet such is the inescapable result of the trial court's decision on this point; and the injured man receives under the Act only two-thirds of his lost wages and nothing for pain and suffering and permanent crippling.

D.

As to Question D.:

The trial court held that the stevedoring contract barred recovery as an additional reason for denying recovery on behalf of the injured men.[20]

19. Title 33 USC 933.
20. R. 59-60.

The court of appeals in its opinion [21] ignored the question, properly raised, of the effect of the stevedoring contract on the right of petitioner to recover on behalf of the injured men.

In the first place, neither petitioner nor the injured longshoremen were parties to the stevedoring contract and it is clear that they are not bound by the terms of this document which did not purport to do anything but establish the rights and relationships of the contracting parties between themselves.

In the second place, although the trial court found both the vessel and the employer guilty of negligence which contributed to the injury, and construed the contract[22] as making the employer liable for injury "caused" by his negligence, it concluded that the contract barred recovery despite its findings that the employer's negligence did not cause, but only contributed to, the injury. In this it was in error.[23]

VII

COPY OF OPINIONS

Copy of opinion in the district court is included in the nine copies of the record in the court of appeals filed with this Petition. Copy of opinion in the court of appeals is appended hereto as Appendix "C".

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21. R. 279-287.
22. R. 59-60.
23. American Stevedores, Inc. vs. Porello, et al, 330 US 446, 91 L.Ed. 1011.

VIII

COPY OF JUDGMENTS

Copy of the Judgment of the district court [24] is appended hereto as Appendix "A".

Copy of the Judgment of the court of appeals[25] is appended hereto as Appendix "B".

IX

CONCLUSION

It is submitted that the conflict arising out of the decision in the Ninth Circuit in the case of United States vs. Arrow Stevedoring Company and the decision in this case in the Fifth Circuit as to the seaworthiness of two ships, of identical types and with identical defects, should be resolved by this Court; that the decision by the court of appeals based on a question not presented to it is in conflict with applicable decisions of this Court; that the court of appeals, in holding the vessel to be seaworthy, decided a federal question in a way in conflict with applicable decisions of this Court; and that simple justice dictates that the three negro longshoremen here so grievously

24. R. 61-62.
25. R. 288.

injured by an admittedly defective ship's appliance should not be deprived of their right against the ship because they accepted compensation.

.....

WILLIAM FISHER

WILLAM FISHER, JR.
Proctors for Petitioner

FISHER & HEPNER
Of Counsel
August, 1954

CERTIFICATE OF SERVICE

I hereby certify that on the.....day of August, 1954, a copy of the foregoing Petition was served, by regular United States airmail, postage prepaid, upon the Solicitor General, Department of Justice, Washington 25, D. C.; and that on the same date a copy of the said Petition was served on Hayford O. Enwall, Esquire, Assistant United States Attorney who appeared as attorney of record for respondent in the Court of Appeals for the Fifth Circuit, by regular United States mail, postage prepaid, addressed to his office at Gainesville, Florida.

.....

WILLIAM FISHER
Member of the Bar of the
Supreme Court of the United States

FINAL DECREE.

In the United States District Court, in and for the Northern District of Florida, Pensacola Division.
Pensacola Civil Cases Numbers 366, 367 & 368.

Fireman's Fund Indemnity Company, a corporation,

Libelant,

vs.

The United States of America, Respondent,

vs.

William S. Rosasco, Jr., et al, Third Party Respondents.

This cause coming before the Court for trial and the Court having heard and considered all testimony and evidence introduced by the parties hereto and argument of counsel and having filed herein its Memorandum Decision in conformity with Admiralty Rule 46½ and being fully advised in the premises it is

Ordered, Adjudged and Decreed that libelant take nothing by these libels and that respondent and third party respondents go hence without day; the costs in each case to be taxed by the Clerk of this Court against libelant.

Done, Ordered and Decreed at Tallahassee, Florida this 19th day of March, 1953.

(S.) DOZIER A. DeVANE,
United States District Judge.

APPENDIX "A"

JUDGMENT.

Extract from the Minutes of March 31, 1954.

FIREMAN'S FUND INDEMNITY COMPANY

NO. 14652 versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 14652

FIREMAN'S FUND INDEMNITY COMPANY,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF FLORIDA.

(March 31, 1954)

Before STRUM and RIVES, Circuit Judges, and
DAWKINS, District Judge.

STRUM, Circuit Judge: Three longshoremen were injured, one fatally, when a heavy steel hatch cover fell on them while unloading the No. 4 lower hold of a Navy cargo vessel, the U.S.S. Okaloosa, at Pensacola, Florida, on September 1, 1948.

Appellant, Fireman's Fund Indemnity Company, libellant below, was the insurance carrier of the stevedoring firm employing said longshoremen. Having paid to date the compensation awards made under the Longshoremen's Act[1] to the injured employees and their dependents, appellant instituted these libels in personam to recover from the United States all sums paid by libellant on account of such awards, and, as subrogee,[2] all sums to which the longshoremen, or their dependents, may be entitled as damages. Libellant asserts that the injuries were caused by the unseaworthiness of the vessel in the respect hereinafter stated, and that the United States was negligent in failing to use due care to provide a reasonably safe place for the longshoremen to work. The trial court entered judgment for respondent, and libellant appeals.

The vessel is a converted Victory class cargo carrier built during World War II. The lower No. 4 hold has two steel hatch covers, port and starboard, each measuring about 8 x 14 feet and weighing upwards of two tons. Each cover is hinged near the vessel's center line so that it can be pulled up into a perpendicular position in order to open the hatches. When fully open, the two covers stand back to back, about five feet apart, extending fore and aft, resting in a perpendicular position on their inboard edge which is attached to the hinge.

These covers are raised into an open position by a steel cable running from a deck winch up over a cargo boom and down to the hatch. The hoisting cable is attached to the hatch cover by a short length of steel

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Note (1): 33 U.S.C.A. 932.
Note (2): 33 U.S.C.A. 933(b) and 933(e)(2)(i).

cable called a "strap," having an "eye" in each end, one end of which is shackled to a "pad-eye"[3] attached to the outboard side of the hatch cover. The other end of the "strap" is attached by a shackle to the hook on the end of the cargo hoist, and the cover thus raised by the deck winch. When the hatch cover has been opened, the "strap" is detached from the cargo cable but remains securely attached to the "pad-eye" in the hatch cover at all times.

There are two ordinary methods of holding the covers in an upright or open position. One is by "L" shaped metal latches attached by a pivot to stationary brackets on the fore and aft bulkheads of the hatch well, so that the hooked end of the latches can be moved up or down several inches, thus engaging or releasing the hatch covers. One of these latches fits over each end of the hatch cover. The latches are ordinarily secured in place, so that they will not jar loose, by a small toggle pin which is inserted through a hole in the latch and on into a corresponding hole in the stationary bracket attached to the bulkhead. These toggle pins are normally attached to a short length of chain, which is in turn attached to the bulkhead near the hole where the toggle pin is to be used.

Another method customarily used to secure the open hatch covers is to tie together the two steel wire "straps" attached to the "pad-eye" on each hatch. The "pad-eye" being on the upper side of the hatch when it is open, this method will also secure the hatches against accidental closing.

Note 3: A flat metal plate securely fastened to the hatch cover, with an "eye" in it into which the shackle bolt is inserted.

The cargo hoist passing up and down the hatch well had frequently torn loose the toggle pins and they were missing much of the time, so that it had become standard practice for the crew of the vessel to use stove bolts with a nut on the end to secure the latches, which was found to be even more satisfactory than the toggle pins. At the time of the accident no toggle pins were available, but a supply of stove bolts, as used by the ship's crew, was laid out ready for use on the deck just above No. 4 lower hold, to the left of the personnel entrance to the hatch trunk, within a few feet of the latches.

On the day in question, the crew of the vessel had worked cargo out of No. 4 upper hold until 4:00 p.m., when the Navy crew knocked off, and the civilian crew, employees of the Schambeau Company, the stevedores, took complete and exclusive control of the work, and of that part of the ship, as independent contractors.

When the civilian crew took over, the first lieutenant of the ship, who is in charge of the ship's equipment, told the contracting stevedore that he, the first lieutenant, would be aboard all night and if the stevedores had any problem with any of the gear to get hold of him or one of the boatswain's mates and they would supply whatever was needed. No such request was made.

About 5:00 P.M., the civilian crew finished unloading No. 4 upper hold, and opened the hatch covers to No. 4 lower hold in order to unload the latter. They pulled the two steel hatch covers into a vertical position and put the metal "L" latches down over the ends of the hatch covers, but did not secure the

latches with bolts, claiming they could not find the latter. Neither did they secure the hatch covers by tying together the two steel "straps" at the top, though the "straps" were attached to the hatch covers and readily available.

About 5:30 o'clock, a wooden "pallet" coming back aboard the vessel in an empty cargo sling fell out of the sling and struck the starboard hatch cover, causing the latches on that cover to "kick up," and the hatch cover fell on the three longshoremen working on top of the full cargo hold just beneath, with the results already stated. After the accident, the hatch covers were reopened, the stove bolts were found, the latches were secured with them, and the steel "straps" at the top of the hatch covers were also tied together.

A situation substantially identical with this was considered by the Ninth Circuit in United States v. Arrow Stevedoring Co., 175 Fed. (2) 329, also page 333, involving the U.S.S. Edgecomb, a cargo ship of the type here involved, equipped with the same type of hatch covers as these, one of which fell and injured two employees engaged in unloading No. 4 port lower hold, because the hatch cover was not properly secured against falling. The Ninth Circuit held that the sole proximate cause of the injuries was the negligence of the stevedores in using the hatch covers with knowledge that they were not secured by safety devices and were likely to fall.

In this case, the district judge found the United States guilty of negligence in failing to provide the necessary toggle pins or other bolts with which to secure the hatch covers in an upright position, but

held that the stevedore company was also guilty of negligence, which would preclude recovery by libellant.

There is an absolute, continuing and non-delegable duty on the part of the ship owner to keep the vessel seaworthy and to use due care to provide a reasonably safe place to work for those employed aboard the vessel, including stevedores and longshoremen. Sea Shipping Co. v. Sieracki, 328 U.S. 85, 90 L. Ed. 1099. In our opinion the United States has here met these requirements.[4]

Absence of the toggle pins did not in these circumstances render the ship unseaworthy because other adequate and suitable means of securing the latches, and of holding the hatch covers erect, were readily available. Middleton v. Ocean Dominion S.S. Co., (2-Cir.) 137 Fed. (2) 619; The Smyrna (4-Cir.) 62 Fed. (2) 1048. Though the evidence is not free from conflict, there is strong and persuasive evidence that an adequate supply of stove bolts and nuts with which to secure the latches, such as were customarily used by the vessel's crew, was laid out on the deck over No. 4 hold inside the hatch trunk, and within a few feet of the latches themselves, where they could have been readily found and put to use by the stevedores.

There is also persuasive evidence that the ship's first lieutenant told the boss stevedore the bolts were there, and explained how to use them in lieu of the

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Note 4: Of course when a vessel is turned over to stevedoes in a safe and seaworthy condition and thereafter becomes unseaworthy solely through the acts of the stevedores, the ship owner is not liable until notice of the changed conditions is brought home to him. Bryant v. Vestland (5-Cir.) 52 Fed. (2) 1078; Mollica v. Sud-Americano, 202 Fed. (2) 25.

toggle pins. Of course the stove bolts were not visible at the moment, as there was still cargo on the floor of the upper hold, but this cargo was removed before the lower hold was opened.

But if there be doubt as to the bolts, there is none that the hatch covers could have been easily and effectively lashed securely in place by the steel lifting straps shackled to the outboard side of each hatch cover, which became the upperside when the hatch covers were opened, a method with which experienced stevedores are fully familiar. After the accident, the hatch covers were re-opened, and the stove bolts were found on the deck where the ship's first lieutenant said he told the boss stevedore they would be found. They were then put in place on the latches. The steel lifting straps were also found shackled to the hatches. The hatches were then lashed together with them, as should have been done in the first place, and the work of unloading proceeded safely. While there are also conflicts in the evidence as to the "strap," we think they were correctly resolved by the district judge.

These were experienced stevedores, the civilian foreman on this job having been stevedoring for twenty years. It was obvious that these hatch covers, when standing in an upright position, were dangerous unless properly secured against falling, which the foreman well knew.[5] The United States in no way participated in the negligent use of the hatch covers. Their negligent use by the stevedores in failing to

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Note (5): When the hatch covers were first opened and the latch put in place but not secured, one of the stevedores remarked to the foreman: "This here don't look like it is going to hold here.* * * * *It seems mighty slack, it look mighty bad to me."

properly secure them, when the equipment for that purpose was readily available, was the sole proximate cause of the longshoremen's injuries. This is another case, such as The Aden Maru, 51 Fed. (2) 599, where serious, and fatal injuries on shipboard have been suffered by employees of an experienced contracting stevedore because a culpably negligent and dangerous method of performing his work was voluntarily and consciously chosen by the stevedore, and voluntarily participated in by the injured longshoremen, when a safe method was at hand, the work being under the exclusive control of the stevedore making the choice. See also U.S. v. Arrow Stevedoring Co., supra; Lauro v. U.S., 162 Fed. (2) 32; Lynch v. U.S., 163 Fed. (2) 97; Grasso v. Lorentzen, 149 Fed. (2) 127; Whyatt v. U.S., 92 Fed. Supp. 543; Signore v. The Ferngulf, 103 Fed. Supp. 677.

As adequate and suitable means of preventing the hatch covers from falling were provided, the United States is thereby exonerated of both the charge of unseaworthiness and the charge of negligence, as both charges rest upon the alleged absence of means with which to prevent the hatch covers from falling. It is because of the availability of these adequate and suitable substitutes that this case differs in principle from Sanford v. Caswell (5-Cir.) 200 Fed. (2) 830, in which this court affirmed the district judge who decided the present case, in holding the vessel unseaworthy because of the entire absence of a ladder by which to board the vessel from the dock, which resulted in injury to one of the crew.

As the sole proximate cause of the injuries here was the negligence of the contracting stevedores, and as unseaworthiness of the vessel has not been established,

the United States is not liable. This being so, it is unnecessary to discuss the contract of indemnity executed by the stevedores to the United States.

AFFIRMED.

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In the Supreme Court of the United States

October Term, 1954

No. 277

FIREMAN'S FUND INDEMNITY CO., *Petitioner*

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Florida, Pensacola Division (R. 51-61), is reported at 110 F. Supp. 937. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 279-87) is reported at 211 F. 2d 773.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1954. (R. 288). A petition

for rehearing, filed on May 6, 1954 (R. 292), was summarily denied on May 14, 1954 (R. 300).[1] The petition for certiorari, which was filed on August 11, 1954, invokes the jurisdiction of this Court under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence in the record to support the district court's findings that respondent's vessel was seaworthy but that respondent was negligent.[2]

2. Whether an insurer, as subrogee to the claim of the insured against a third person, is barred by the insured's negligence and contractual promise to indemnify that person.

STATUTES AND CONTRACT PROVISIONS INVOLVED

Sections 4 and 33 of the Longshoremen's and Harbor Workers' Compensation Act,[3] as amended, are set forth in the Appendix, *infra*, pp. 13-16.

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[1] The petition for rehearing was not filed within the 21-day period fixed by Rule 29 of the Rules of the court of appeals, but was presented by special leave of Circuit Judge Strum granted pursuant to a motion likewise filed after the 21 days had expired (R. 289-291).

[2] The district court also found that petitioner's subrogor was contributorily negligent, but that finding was not challenged by petitioner in the court below or in the petition. The propriety of that finding is therefore not in issue in this Court.

[3] Sec. 4, 44 Stat. 1426, 33 U.S.C. 904; Sec. 33, 44 Stat. 1440, as amended, 52 Stat. 1168, 33 U.S.C. 933.

The relevant provisions of the contract between respondent and petitioner's subrogor are also included in the Appendix, *infra*, p. 17.

STATEMENT

On September 1, 1948, the USS *Okaloosa*, a naval transport, docked at Pensacola, Florida, for unloading. In order to expedite unloading, and in accordance with common naval procedure, an officer at the Pensacola Naval Air Station made verbal arrangements with Rosasco Brothers, a commercial stevedore, to discharge the cargo (R. 22). The verbal agreement of September 1 was formalized in writing on September 3 in a contract stated to be effective September 1, 1948. Crew-members of the *Okaloosa* began to discharge the cargo immediately and continued to do so until relieved by the commercial stevedore.

Longshoremen employed by the L. P. Schambeau Stevedoring Company, subcontractors for Rosasco, began unloading the *Okaloosa* at 4:00 P.M. After approximately one hours's work, they had removed all the cargo from the upper portion of hold #4 and uncovered the hatch covers to the lower part of the hold. None of the ship's crew was present from the time the stevedore began to unload, but before leaving the hold the boatswain in charge of the ship's unloading crew instructed the stevedore's people how to raise and safely secure the hatch covers (R. 239-40). The covers are hinged near the center of the ship; when raised they stand back-to-back about five feet

apart. On this occasion the hatch covers were raised by a steel cable from a deck winch and secured in place by hooks or "L" shaped metal latches attached to the bulkheads.[4]

The original design of the ship called for toggle pins to be suspended by a chain from the bulkhead for insertion into the metal latches and the bulkhead in order to prevent the latch from being jarred loose so as to release the hatch cover. Because these toggle pins had repeatedly been torn loose by the hoists of cargo in past operations, they were not replaced and were not available on the date of the accident. All this had been explained to personnel of the stevedoring subcontractor, and alternative means of securing the covers were described to them (R. 236, 256.)[5]

There were at least three other means of securing the hatch covers which provided protection equal to that afforded by the originally designed hooks and toggle pins, if not better: (1) An adequate supply of stove bolts and nuts, which were superior substitutes for the original toggle pins, were laid out on the deck of upper #4 hold (R. 237). (2) The steel lifting straps attached to the tops of the two hatch covers could be lashed to-

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[4] A diagram of a hatch cover and one means of securing it in an open position can be found in the Record, p. 39.

[5] There is some conflict in the testimony as to what description of alternative means of securing the covers was given the stevedore people. The record citations here are to the testimony which the lower courts apparently considered most reliable.

gether so as to prevent either cover from falling (R. 208, 238). (3) If necessary, the steel cables used to lift the covers could have been left attached to the covers, thus preventing an accidental closing. Although the stevedore was highly experienced, the foreman having had more than twenty years experience in such work, the stevedoring personnel took none of the three alternative precautions available to secure the hatch covers. The district court specifically found that the stevedore foreman should have known and did in fact know the danger presented by the insufficiently secured hatch covers (R. 58).

With the hatch covers secured open in this precarious fashion, the longshoremen proceeded to unload the lower part of #4 hold. At 5:35 P.M., when the unloading operations were within the exclusive control of the commercial stevedore, a wooden "pallet" fell out of an empty cargo sling which was being lowered into the hold. It struck one of the raised hatch covers causing it to be dislodged and to fall on three longshoremen working in the lower part of #4 hold. One of them was killed, and the other two were badly injured.

The petitioner, as workmen's compensation insurance carrier for Rosasco, paid to the injured longshoremen and the beneficiaries of the deceased man the amounts due them under the Longshoremen's and Harbor Workers Compensation Act. Then, as subrogee of Rosasco, petitioner brought this suit against the United States.

After consideration of all the evidence, the district court found that the *Okaloosa* was seaworthy but that the personnel of that vessel were negligent. Petitioner was barred from recovery, however, by the negligence of its subrogor, Rosasco Brothers. Moreover, the court construed the contract between Rosasco and the United States to include a promise by Rosasco to indemnify the United States against liability arising, in whole or in part, out of the negligence of Rosasco; this was a second bar to petitioner's recovery. The Court of Appeals for the Fifth Circuit, on appeal by petitioner, affirmed the district court's decree. The appellate court concurred in the finding that the *Okaloosa* was seaworthy but did not find sufficient evidence to support the conclusion that naval personnel had been negligent. Thus, having determined that there was no basis for liability by the United States, the Court of Appeals had no need to examine the two bars to recovery relied on by the district court.

ARGUMENT

1. To establish a basis for recovery from the United States, petitioner must show that the United States was absolutely liable for the injuries to the longshoremen, as the owner of an unseaworthy vesel, or that naval personnel were guilty of negligent conduct which caused the accident. The district court concluded that petitioner had failed to show the former basis of liability; the

court below, upon a review of the evidence, determined that petitioner had not sustained its burden of proving either ground.

a. The petition requests this Court to overturn the concurrent findings of both courts below that the *Okaloosa* was seaworthy. It is well established that an issue of fact, such as the seaworthy nature of a vessel, will not be re-examined by this Court after it has been twice considered below with consistent results. *Luckenbach* v. *McCahan Sugar Co.*, 248 U.S. 139; cf. *Just* v. *Chambers*, 312 U.S. 383. Moreover, if this Court should decide to make a third examination of the testimony relevant to the issue of seaworthiness, deference ought to be given to the findings of the trial judge who had opportunity to observe the witnesses.[6] In the present case the rulings below seem well supported. Three means of safely securing the hatch covers in an open position were readily available. Petitioner is reduced to the argument that the absence of a fourth method made the ship unseaworthy. This is not a case in which faulty equipment was accidently used when safe alternative equipment could have been used. *E.g.*, *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96. Rather this was an instance in which available safeguards were ignored by employees of an experienced stevedore with knowledge of the danger presented

[6] For a compilation of over 120 decisions by federal courts of appeals applying this principle in admiralty cases, see *Annotation*, 103 A.L.R. 775, 791-93.

by the patent absence of the designed means of securing the covers.[7] Except for the substitution by the ship's people of stove bolts for the toggle pins of the original design,[8] the petition suggests no reason for overturning the decisions below as to seaworthiness.

b. A second determination of fact to which the petition objects is the conclusion of the court below absolving the United States from negligence. The record contains little evidence to support a conclusion of negligence by the naval personnel; the district court found such negligence solely on the ground that the naval personnel did not make the replacement stove bolts available to the stevedore before leaving (R. 57). However, the uncontradicted testimony of the boatswain in charge points out that the bolts were then covered by cargo remaining in upper #4 hold (R. 236). The ship's crew exercised all due care by describing the methods of securing the covers (R. 208, 238) and making themselves available should any question arise (R. 215-16).

The petition does not squarely deny the correctness of the ruling on this issue by the court

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[7] At the time the hatch covers were raised one longshoreman objected, "I don't believe this here is going to hold, it looks mighty slack, this looks mighty bad to me." (R. 117). (R. 117).

[8] On the basis of uncontradicted testimony (R. 205, 229), the Court of Appeals concluded that use of the bolts would have provided greater safety than the originally designed toggle pins (Pet. 23).

below; instead it challenges that court's right to consider such a question. It is petitioner's stand that the failure by the United States to cross-assign error in the court of appeals forecloses the Government's rights and precludes examination by that court of this question. Although in general an appellate court in admiralty will not review findings without an assignment of error, an appeal is a trial *de novo* and the court clearly retains the power to do so.[9] See 4 Benedict, *Admiralty* (6th ed.), §§ 564, 572. In the instant case the court below reviewed the finding of negligence as well as the finding of seaworthiness, assigned as error by petitioner, since substantially the same evidence was involved. Indeed, it would be difficult to reconcile a limitation of the appellate court's power to review here with the general power in admiralty to try issues *de novo*. See Supreme Court Admiralty Rule 45; Rules of the Court of Appeals for the Fifth Circuit, Rule 12.

2. Even if the United States were responsible for injury to the longshoremen on the ground of unseaworthiness or negligence, this plaintiff could

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[9] The 1938 Rules of the Court of Appeals for the Second Circuit, for example, make specific reference to this power. See Rule 10. The cases cited by petitioner (Pet. 13, fn. 16) refer to the general refusal by appellate courts to change the decree of the district court in favor of a party without an appeal by that party. They are therefore inappropriate where, as here, the court considered unassigned error as an alternative ground for affirmance. See *Morley Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191.

not recover. As the district court found (R. 57-61), petitioner is barred by the negligence and by the indemnity contract of its subrogor.

a. Petitioner's rights are those of a subrogee under the provisions of the Longshoremen's and Harbor Worker's Compensation Act. Sec. 33(i), *infra*, p. 16. Since it is generally agreed that a subrogee has no rights greater than his subrogor, petitioner is barred by any defenses which the United States would have had in a suit by the subrogor (Rosasco). Cf. *United States* v. *Munsey Trust Co.*, 332 U.S. 234. Nor is there any reason to believe that a different rule governs the rights of a subrogee under this Act. Therefore, the unchallenged finding of the district court that Rosasco was precluded from suit by its own negligence would prevent recovery by Rosasco's insurer. Indeed, neither Rosasco nor petitioner could obtain contribution even though the negligence of Rosasco was slight. *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282.

But the petition argues that petitioner is also suing on behalf of the injured employees whose rights should not be impaired by defects in the rights of Rosasco. This contention ignores the clear language of the statute:[10] "the insurance carrier shall be subrogated to all the rights of the *employer* under this section" [emphasis added]. The fact that under the Act the employer, Ro-

[10] Sec. 33(i), 44 Stat. 1440, as amended, 52 Stat. 1168, 33 U.S.C. 933(i), *infra*, p. 16.

sasco, has the power to sue on behalf of his injured employees does not mean that his suit is exempt from all personal defenses. In *United States* v. *Munsey Trust Co., supra,* this Court expressly rejected the argument that an employer, as stakeholder of his employee's rights, can recover without regard to his ability to prevail alone.[11]

b. Rosasco, and therefore petitioner as well, was further prevented from recovery by its contract to indemnify the United States.[12] The district court found that the agreement as "clarified and/or modified" included a promise by Rosasco to indemnify the United States for liability arising, in whole or in part, out of the negligence of the stevedore. Petitioner does not point to evidence contradicting that construction or suggest any reason why the district court was in error.[13]

3. The case of *United States* v. *Arrow Stevedoring Co.*[14] is said by petitioner to represent a conflict with the decision below requiring review

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[11] Should certiorari be granted, this Court could not finally dispose of this case since the contributory negligence of the injured longshoremen which was placed in issue (R. 17), would then have to be tried in the district court.

[12] This case differs from *American Stevedores* v. *Porello,* 330 U.S. 446, where this Court remanded to the district court to take evidence as to the meaning of an ambiguous contract for indemnity. Such evidence has already been heard in the present case, and all ambiguity has been resolved.

[13] The ruling of the trial court should be given special weight in such matters. See fn. 6, *supra,* p. 7.

[14] 175 F. 2d 329 (C.A. 9), certiorari denied, 338 U.S. 904.

by this Court. The Ninth Circuit decision in that case upheld the right of a shipowner to indemnity against a negligent stevedore contractor in accordance with the similar clause of their contractual agreement. To that extent the *Arrow Stevedoring* case supports the ruling below. Moreover the court there, as here, reversed a district court finding of negligence by the navy personnel in a very similar fact situation. The petition argues, however, that the two decisions conflict in their rulings as to seaworthiness. But the unseaworthiness of the vessel created by the stevedore in the Ninth Circuit case was not contested or litigated, and even if it had been litigated, the conflict would be no more than a difference in findings of fact on somewhat different evidence.[15]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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SAMUEL D. SLADE.
Attorney,

SEPTEMBER 1954.

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[15] In the *Arrow Stevedoring* case, for example, there is no express finding of alternative means of securing the covers.

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, provides in part as follows:

Section 4 [44 Stat. 1426, 33 U.S.C. 904] Liability for compensation.

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

Section 33 [44 Stat. 1440, as amended, 52 Stat. 1168, 33 U.S.C. 933] Compensation for injuries where third persons are liable.

> (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensa-

tion or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 7;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes

proceedings within the period prescribed in section 13, the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this Act is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

Contract Navy Department No. N204s-27661 between the United States Navy and Rosasco Brothers, plaintiff's subrogor, includes this provision (R. 23):

> As old age benefits, workmen's compensation, state's unemployment benefits, and public liability insurance rates are included in the hourly rate specified herein, all liability for damage or injury to persons or property resulting from the performance of this contract is assumed by the contractor.

This language was subsequently "clarified and/or modified" in a letter written by Commander J. W. Bottoms, U. S. Navy Supply and Fiscal Department (R. 34):

> * * * this letter is being directed to you as a clarification and/or modification of the written contract, and we hereby agree with you that your obligation in this regard is by your contract limited to pay all old age benefits and unemployment benefits on your employees, maintain workmen's compensation insurance on your employees, and carry contractor's public liability insurance to cover damage to Government property, or injury or damage to third persons caused by your negligence, or that of your employees, and not otherwise.

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